

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

JOHN ALSTON,

Petitioner,

v.

**9:03-CV-1528
(FJS/VEB)**

JAMES CONWAY, Superintendent,

Respondent.

APPEARANCES

OF COUNSEL

JOHN ALSTON

98-A-2087

Sing Sing Correctional Facility

354 Hunter Street

Ossining, New York 10562

Petitioner *pro se*

**OFFICE OF THE NEW YORK
STATE ATTORNEY GENERAL**

The Capitol

Albany, New York 12224

Attorneys for Defendant

MICHAEL G. MCCARTIN, AAG

SCULLIN, Senior Judge

ORDER

In a Report and Recommendation dated June 27, 2007, Magistrate Judge Bianchini recommended that this Court deny and dismiss Petitioner's petition. *See* Dkt. No. 11. Petitioner filed objections to those recommendations. *See* Dkt. No. 13.

Plaintiff objects to Magistrate Judge Bianchini's finding that the state trial court's decision not to submit the lesser-included offense of manslaughter to the jury was not contrary

to, or an unreasonable application of, clearly established Supreme Court precedent and that the trial court correctly refused to give such an instruction in light of the facts presented. In addition to the reasons that Magistrate Judge Bianchini stated, the Court notes that, pursuant to *Jones v. Hoffman*, 86 F.3d 46, 48 (2d Cir. 1996) (citations omitted), federal courts are precluded, in a habeas proceeding, from reviewing decisions regarding the submission of lesser-included offenses in non-capital cases. *See Caimite v. Fischer*, No. 05 CV 3324, 2009 WL 236917, *9 (E.D.N.Y. Feb. 2, 2009) (holding that "the state court's charging decision [not to instruct the jury on first-degree manslaughter as a lesser included offense of depraved indifference murder] does not provide a basis for federal habeas relief in this case"); *Maldonado v. West*, No. 1:05-CV-3132, 2007 WL 188684, *6 (E.D.N.Y. Jan. 22, 2007) (citations omitted). Therefore, for this reason as well as the reasons stated in Magistrate Judge Bianchini's Report and Recommendation, the Court finds that Petitioner's objections with respect to his claim regarding the trial court's decision not to submit the lesser-included offense to the jury are without merit.

Plaintiff also objects to Magistrate Judge Bianchini's recommendation with respect to his claim of prosecutorial misconduct. The Court's review of Magistrate Judge Bianchini's Report and Recommendation, in light of Plaintiff's objections, demonstrates that Magistrate Judge Bianchini correctly applied the appropriate law and that Plaintiff's objections are without merit.

Accordingly, after carefully considering Magistrate Judge Bianchini's June 27, 2007 Report and Recommendation, Plaintiff's objections thereto, as well as the applicable law, and for the reasons stated herein and in Magistrate Judge Bianchini's Report and Recommendation, the Court hereby

ORDERS that Magistrate Judge Bianchini's June 27, 2007 Report and Recommendation

is **ADOPTED** in its entirety; and the Court further

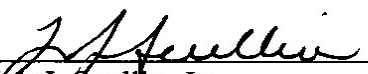
ORDERS that Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C.

§ 2254 is **DENIED** and his petition is **DISMISSED**; and the Court further

ORDERS that, because Petitioner has not made a "substantial showing of the denial of a constitutional right," pursuant to 28 U.S.C. § 2253(c)(2), no Certificate of Appealability will issue with respect to any of Petitioner's claims.

IT IS SO ORDERED.

Dated: March 26, 2009
Syracuse, New York



Frederick J. Scullin, Jr.
Senior United States District Court Judge